

STATE OF MICHIGAN
COURT OF APPEALS

JASON DAVID BETZOLDT,

Plaintiff-Appellant,

v

MELISSA TRAVIS and BUDDY DALE
MILLER, III,

Defendants-Appellees.

UNPUBLISHED

October 30, 2008

No. 280942

Macomb Circuit Court

LC No. 2007-002133-NZ

Before: O'Connell, P.J., and Smolenski and Gleicher, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition. Because we conclude that the trial court properly granted summary disposition in favor of defendants, we affirm. This appeal has been decided without oral argument under MCR 7.214(E).

Defendants moved for summary disposition under MCR 2.116(C)(8) and (10). Although the trial court did not specify under which subrule it found summary disposition appropriate, because the court referred to evidence submitted by defendants, we presume that the court granted the motion under MCR 2.116(C)(10). This Court reviews de novo a trial court's decision on a motion for summary disposition. A motion under MCR 2.116(C)(10) tests the factual sufficiency of the plaintiff's complaint. *Robinson v Ford Motor Co*, 277 Mich App 146, 150; 744 NW2d 363 (2007). The trial court must consider the affidavits, pleadings, depositions, admissions, and any other evidence submitted by the parties in a light most favorable to the nonmoving party. *Id.* Summary disposition should be granted if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 150-151.

Plaintiff first argues that the trial court erred in dismissing his malicious prosecution claim. To establish a claim of malicious prosecution, a plaintiff must prove: (1) the defendant initiated a criminal prosecution against him, (2) the criminal proceedings terminated in his favor, (3) the private person who instituted or maintained the prosecution lacked probable cause for his actions, and (4) the action was undertaken with malice or a purpose in instituting the criminal claim other than bringing the offender to justice. *Walsh v Taylor*, 263 Mich App 618, 632-633; 689 NW2d 506 (2004). Because plaintiff failed to establish a question of fact on the first element, the trial court properly granted summary disposition of this claim in favor of defendants.

In Michigan, a prosecutor must normally authorize a prosecution. *Matthews v Blue Cross & Blue Shield of Michigan*, 456 Mich 365, 384; 572 NW2d 603 (1998). And a “prosecutor’s exercise of his independent discretion in initiating and maintaining a prosecution is a complete defense to an action for malicious prosecution.” *Id.* However, a private person will be treated as having initiated a prosecution where, “by false statements, or willful concealment of facts, or improper inducement or pressure on the prosecuting officials,” the private person induced the prosecutor to initiate the prosecution. *Renda v Int’l Union, UAW*, 366 Mich 58, 87; 114 NW2d 343 (1962).

In this case, there was no evidence that either defendant improperly influenced or pressured the prosecutor to bring charges against plaintiff. Instead, plaintiff contends that, when interviewed by the police officer that responded to the scene, defendants did not fully disclose potentially exculpatory information. However, even if we were to conclude that there was question of fact as to whether defendants failed to disclose potentially exculpatory information, that alone would not preclude summary disposition unless the omission caused the prosecutor to act. *Mathews, supra* at 385. Therefore, absent evidence that the prosecutor acted on the omissions, plaintiff’s claim for malicious prosecution must fail.

It is undisputed that the Sheriff’s Department responded to Miller’s call and conducted an independent investigation of the incident. The sheriff’s report noted that Travis had “redness and a mild abrasion on her upper chest area.” Thus, there was independent evidence that Travis had been struck. The report further stated that plaintiff “admitted to pushing his ex-wife,” but that he did so only after “she tried to enter his home without permission.” From this, it is clear that the prosecutor must have been aware of plaintiff’s claim that he acted lawfully when he attempted to prevent Travis from forcing her way into his home. That is, the prosecutor had to have been aware that the issue came down to a credibility contest between plaintiff’s version of the events and defendants’ versions of the events. For that reason, even if it can be said that defendants deliberately omitted facts from their description of the events, the prosecutor nevertheless was aware of the facts necessary to make an independent decision about whether to proceed to charge plaintiff. Under these circumstances, defendants cannot be regarded as having instigated the proceeding. See *id.* at 386.

Plaintiff failed to establish a question of fact concerning whether defendants initiated the criminal prosecution against plaintiff and, for that reason, defendants were entitled to summary disposition of plaintiff’s malicious prosecution.

Next, plaintiff asserts that the trial court erred in dismissing his claim of abuse of process. To recover under a theory of abuse of process, “a plaintiff must plead and prove (1) an ulterior purpose, and (2) an act in the use of process which is improper in the regular prosecution of the proceeding.” *Friedman v Dozor*, 412 Mich 1, 30; 312 NW2d 585 (1981). The essence of the defendant’s misconduct is not the wrongful initiation of civil or criminal proceedings; it is the use of a proper legal procedure for a purpose other than that which it was designed to accomplish. See *id.* at 30, n 18, quoting 3 Restatement Torts, 2d, § 682, comment a, p 474. Hence, a claim of abuse of process contemplates a situation where the defendant has used a proper legal procedure “for a purpose collateral to the intended use of that procedure.” *Vallance v Brewbaker*, 161 Mich App 642, 646; 411 NW2d 808 (1987). Such as where a litigant utilizes discovery in a manner consistent with the rules of procedure, but for the improper purpose of

imposing an added burden and expense on the opposing party in an effort to conclude the litigation on favorable terms, the opposing party has a meritorious claim of abuse of process. *Id.*

In this case, the trial court correctly determined that plaintiff neither alleged nor presented evidence of any acts by defendants that could be classified as an improper use of process. Plaintiff's sole allegation of improper conduct is defendants' allegedly untruthful report to the police that plaintiff pushed Travis. However, an action for abuse of process lies for the improper use of process after it has been issued, not for maliciously causing it to issue. *Friedman, supra* at 31. Plaintiff has failed to allege that, after he was arrested and charged with domestic violence, defendants availed themselves of a proper legal procedure for a purpose collateral to the intended use of that procedure. See *Vallance, supra*. Accordingly, summary disposition was appropriate.

Affirmed.

/s/ Peter D. O'Connell
/s/ Michael R. Smolenski
/s/ Elizabeth L. Gleicher